[Cite as *Erie Islands Resort & Marina v. Fowler*, 2009-Ohio-2925.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Erie Islands Resort & Marina	Court of Appeals No. OT-08-052
Appellee	Trial Court No. CVF 0800057
v.	
Dale P. Fowler and Julia Fowler	**DECISION AND JUDGMENT**
Appellants	Decided: June 19, 2009

* * * * *

John A. Coppeler, for appellee.

Dale P. Fowler and Julia F. Fowler, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Dale P. Fowler and Julia A. Fowler, pro se, appeal a decision of the Ottawa County Municipal Court granting summary judgment to appellee, Erie Islands Resort & Marina. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} This case involves a claim for unpaid annual maintenance fees and assessments relating to appellants' undivided interest in Erie Islands Resort Treetop

Villas, which interest was purchased in 2003, from a California company known as Timesharevalues.com, LLC.

{¶ 3} Appellee, after filing its complaint in the matter, filed a motion for summary judgment. The motion was supported by the affidavit of Jo Ann Franks, appellee's credit and collections manager. In the affidavit, Franks testified that she is employed by appellee as its credit/collections manager and that she is familiar with the specific accounting and business records related to this case. Franks further indicated that the records attached to her affidavit were prepared by appellee's employees at the time of the transaction or events and that those records are kept and maintained by appellee in the regular course of its business.

{¶ 4} Franks additionally testified that the warranty deed by which appellants took title to an undivided interest in Erie Islands Resort Treetops Villas on September 29, 2003, was recorded in Official Record Book 962, Page 648, in the Ottawa County, Ohio Recorder's Office. The warranty deed provided that the undivided interest that was conveyed to appellants was subject to the Second Amended and Restated Declaration of Covenants, Conditions and Restrictions of Erie Islands Resort & Marina recorded in the Recorder's Office for Ottawa County, Ohio in Volume 354, page 118. Attached to the Franks affidavit were applicable provisions of the Declaration pertaining to annual maintenance fees and special assessments relating to appellants' real property interest.

{¶ 5} Listed in the affidavit were the amounts of maintenance fees that were owing for each year, beginning in 2005 and ending in 2008, and the amounts of special

assessments that were incurred between 2005 and April 2007. The sum of the annual maintenance fees and special assessments that were stated to be owed by appellants as of January 1, 2008, is $2,298.50.

{¶ 6} In response to appellee's motion, appellants filed an affidavit by appellant Dale Fowler. In this affidavit, Fowler stated that he had contacted appellee on various occasions to "challenge accuracy and reasonableness of maintenance fees." He further stated that he had engaged in a telephone conversation with an employee of appellee, named Brenda, who indicated that the resort had suffered a database crash and loss of records, "leading [to the] possibility of billing error by [appellee]."

{¶ 7} In addition, Fowler testified that he had located "several high season/every year use Erie Island Resort weeks for sale that have far lower maintenance fees." Finally, Fowler stated that he disputed the accuracy, reasonableness and fairness of the 543 percent increase in maintenance fees, and their disproportionate amount.

{¶ 8} In a judgment entry dated September 16, 2008, the trial judge adopted a decision and recommendation of the magistrate that granted summary judgment in favor of appellee. Appellants timely appealed the judgment entry, raising the following assignments of error:

{¶ 9} I. "THE TRIAL COURT HAS NO JURISDICTION PER APPELLEE'S AGREEMENT TO ABIDE BY THE ASSURANCE OF VOLUNTARY COMPLIANCE WITH INDIANA."

{¶ 10} II. "THE TRIAL COURT ERRED BY DENYING APPELLANTS' OBJECTION TO JURISDICTION."

{¶ 11} III. "THE TRIAL COURT ERRED BY RELYING UPON AN AFFIDAVIT LACKING IN PROPER FOUNDATION."

{¶ 12} IV. "THE MAGISTRATE ERRED IN HIS STARTING PREMISE REGARDING RULE 56."

{¶ 13} V. "THE COURT FAILED TO REALIZE THAT MORE THAN ONE CONCLUSION IS POSSIBLE."

{¶ 14} VI. "THE APPEALS COURT NEEDS TO APPLY EQUITY."

{¶ 15} Appellants' first and second assignments of error are related and will be addressed together. Both arguments are premised entirely on a document that was never filed with the trial court and, thus, cannot be considered in this appeal. See *State v. Pingor*, 10th Dist. No. 01AP-302, 2001-Ohio-4088, fn. 1, citing *Isbell v. Kaiser Found. Health Plan* (1993), 85 Ohio App.3d 313, 318 (holding that an appellate court "cannot consider exhibits, affidavits, or 'other matters attached for the first time to an appellate brief which were not properly certified as part of the trial court's original record and submitted to the court of appeals'").

{¶ 16} Even if the document in question were properly part of the record, we find that it is inapplicable to this case. The document, entitled "Assurance of Voluntary Compliance" is purportedly a document signed by Erie Islands Resort and Marina, Inc., a corporation, and not the appellee herein, Erie Islands Resort & Marina, an Ohio general

partnership. It relates to sales of time share memberships in a project known as Landings at Seven Coves, in Texas, which is not involved at all in this action. In addition, appellants purchased their interest in Erie Islands Resort Treetops Villas from a California company, and not from appellee or from the corporation referred to in the document.

{¶ 17} For the foregoing reasons, appellants' first and second assignments of error are found not well-taken.

{¶ 18} Appellants' third, fourth, and fifth assignments of error all deal with the trial court's granting of summary judgment in appellee's favor and, thus, will be considered together in this analysis.

{¶ 19} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 20} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *"

{¶ 21} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law;

and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 22} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 23} Appellants specifically argue: (1) that the Franks affidavit, filed by appellee, lacked a proper foundation; (2) that the magistrate "erred in his starting premise regarding Rule 56" because he did not find that the Fowler affidavit created a genuine issue of material fact; and (3) that the trial court "failed to realize that more than one conclusion is possible."

{¶ 24} Appellants claim that the Franks affidavit lacked a proper foundation because there did not exist "underlying business records." We disagree. In this case, the Franks affidavit itself qualifies as a business record within the scope of Evid.R. 803(6), because it lists the amounts of maintenance fees and special assessments that are alleged to be due and owing by appellants. See Evid.R. 803(6); *Erie Islands Resort & Marina*, 6th Dist. No. OT-05-024, 2006-Ohio-730, ¶ 12 ("A simple list of outstanding balances

owed to a business entity is indeed a 'memorandum, report, record, or data compilation, in any form, of acts, events, or conditions.").

{¶ 25} Arguing against this conclusion, appellants point to affidavit testimony by Dale Fowler wherein he stated that he had "engaged in a telephone conversation with an Erie Island employee named Brenda who indicated that the resort had suffered a database crash and loss of records, leading [to the] possibility of billing error by [appellee]." Such testimony is not legally sufficient under Civ.R. 56(E) either to create a genuine issue of material fact or to support the existence of more than one reasonable conclusion as to whether appellee is entitled to summary judgment. First, Civ.R. 56(E) relevantly provides that affidavits in support of or opposing summary judgment "shall be made on personal knowledge". Fowler's allegation that records were lost was clearly not based upon his own personal knowledge. In addition, Fowler's affidavit fails to provide when the alleged conversation with "Brenda" took place or when the alleged "database crash and loss of records" may have occurred. Finally, we observe that Fowler's affidavit fails specifically to dispute the accuracy of Franks' statements; instead, it merely suggests that the alleged database crash and loss of records leads to the "possibility of billing error." As there was no showing by appellants, either by Fowler's affidavit or otherwise, of specific facts demonstrating the existence of a genuine issue for trial, we find that summary judgment was properly granted in favor of appellee. Accordingly, appellants' third, fourth, and fifth assignments of error are found not well-taken.

{¶ 26} Finally, appellants argue, in their sixth assignment of error, that this court "needs to apply equity," because appellants have "repeatedly pointed to the anomalous, unreasonable, and documented disproportionality of Erie Island billings." Equitable remedies apply when damages at law are not adequate to fully compensate the plaintiff for his injuries. See *Stacey v. Ohio Turnpike Comm.* (Mar. 11, 1977), 6th Dist. No. WMS-76-7. This concept is inapplicable both to appellants and to this case. Thus, appellants' sixth assignment of error is found not well-taken.

{¶ 27} For all of the foregoing reasons, the judgment of the Ottawa County Municipal Court is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE